SUPREME COURT, U. S.

APR 18 1969

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No. 1109

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

EDNA WEED,
Petitioner,

vs.

OWEN BILBREY, SR., GLADYS BILBREY, OWEN BILBREY, JR., PHYLLIS BILBREY, JAMES E. THOMPSON, JR., and PAULA THOMPSON, d/b/a OWEN BILBREY FRUIT COMPANY and JAMES E. THOMPSON, JR., Individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1-3)[1] is reported at 215 So.2d 479 (Fla. 1968). The preceding opinion of The Second District Court of Appeal of Florida in the same cause (Pet. App. 5-11) is reported at 201 So.2d 771 (Fla. DCA 2d, 1967).

1. "(Pet. App.)" refers to the Appendix to the Petitioner's Petition for a Writ of Certiorari filed in this cause.

JURISDICTION

This litigation began when Petitioner filed a Complaint for damages against Respondents in the Circuit Court for Polk County, Florida. (Pet. App. 5). In its pertinent aspect, the damage suit was brought pursuant to the terms and provisions of the Florida Wrongful Death Act, Florida Statutes, §§ 768.01, 768.02; and the Complaint alleged that the death of the Petitioner's decedent resulted from the Respondents' negligent operation of an air boat and a consequent collision on the Kissimmee River in Polk County, Florida. (Pet. App. 5).

The trial Court (Circuit Court for Polk County, Florida) ruled that the defendants in that cause (Respondents here) were entitled to assert the decedent's contributory negligence as a complete defense. (Pet. App. 5). The jury returned a verdict in favor of the Respondents in the Wrongful Death Act suit. (Pet. App. 6).

Petitioner appealed to the Second District Court of Appeal of Florida on the question of whether, under the provisions of the Florida Wrongful Death Act, admiralty principles prevail or "whether rules of the state applicable to tort law apply." (Pet. App. 7). The Second District Court of Appeal of Florida thereupon undertook to determine this "point of law" under the express terms of the Florida Wrongful Death Act (Pet. App. 7); and interpreted and construed the Florida Statute to mean that the maritime doctrine of comparative negligence, and not the traditional defense of contributory negligence, should be applied if the fatal accident occurs on navigable water in Florida. The District Court reasoned that the conceptual effect of the Florida Wrongful Death Act was to "preserve" to the enumerated statutory beneficiaries of that Act all rights which their decedent would have had had he lived. (Pet. App. 9). (Pet. App. 11). The judgment of

the trial court was accordingly reversed by the Second District Court of Appeal. (Pet. App. 11).

The Respondents thereafter filed a Petition for Writ of Certiorari in the Supreme Court of Florida seeking review of the decision of the Second District Court of Appeal. (Pet. App. 1). A Writ of Certiorari was granted by the Supreme Court of Florida (Pet. App. 1); and, upon consideration on the merits, the Florida Supreme Court held that the intermediate appellate court had misconstrued and misinterpreted the Florida Wrongful Death Act. (Pet. App. 1-2). The Supreme Court of Florida held and stated that the Florida Wrongful Death Act did not have the conceptual effect of "preserving" to the statutory beneficiaries all the identical rights of their decedent, but, instead that the act "creates" an entirely new right of action "on different principles". (Pet. App. 1, 2). The Florida Supreme Court thus held that the Florida Wrongful Death Act does not embrace the maritime principle of comparative negligence. (Pet. App. 1-2).

The present Petition for a Writ of Certiorari seeks review of that decision of the Supreme Court of Florida. The Respondents submit, and we will argue in the "Argument" portion of this brief, that the Petitioner has demonstrated no predicate for the assumption of jurisdiction by this Honorable Court in this cause since the decision of the Florida Supreme Court herein, and the decision of the intermediate appellate court which preceded it, are each addressed to a narrow question of interpretation of a state statute. This question is purely local in character and harbors no "federal question" either expressly or impliedly. Neither decision discusses or even mentions the federal questions raised here by the Petitioner in the "Questions Presented" portion of the Petition.

QUESTIONS PRESENTED

The Petitioner states, as the questions presented, the following (Petition, page 4):

> I) Does Article III, Section 2 of the Constitution of the United States, or federally developed maritime principles, require uniform application of substantive admiralty principles by the states to actions for wrongful death brought under State Wrongful Death Acts, arising out of maritime torts committed on state navigable waters?
>
> II) Does application of substantive state common law tort principles, foreign to federally enunciated maritime doctrines, by the courts of a state under such a state statute, unfairly discriminate against statutory beneficiaries in violation of the Fourteenth Amendment?
>
> III) Does application of substantive state common law tort principles, by the Courts of a state under such a State statute, contravene the provision of Article VI of the Constitution of the United States, which renders the Constitution and laws of the United States made in pursuance thereof the supreme law of the land?

We respectfully observe at this juncture that the Petitioner did not raise, present or even mention these questions at any appropriate stage of the proceedings in the Courts of the State of Florida. These questions were raised by Petitioner for the first time *after* the filing of the decision of the Florida Supreme Court sought to be reviewed here. (Petition, page 10). These questions were therefore not considered by the Supreme Court of Florida or the Florida intermediate appellate Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions deemed to be involved by Petitioner (Fla. Stat. § 768.01; U.S. Const., Art. III, § 9; U.S. Const., Amend. XIV, § 1; U.S. Const., Art. VI) are set forth in the Petition at pp. 5-6.

STATEMENT OF THE CASE

The underlying facts are adequately set forth in the Petition at pp. 7-11. In addition, the Respondents respectfully refer the Court to the matters recited herein under the heading of "Jurisdiction".

ARGUMENT

Under this heading we will set forth the reasons for denying the writ in this cause. The fundamental basis of the Respondents' contention is that the decision sought to be reviewed is addressed to the narrow question of the construction of a statute enacted by the Florida legislature. The decision is entirely local and non-federal in content and substance, and emerges solely from the performance by the Florida Supreme Court of its duty judicially to construe the statutes of the State of Florida. This was the basis upon which the Petitioner approached the problem throughout the proceedings in the State Courts. Only after the Florida Supreme Court interpreted the statute in a manner unfavorable to Petitioner did Petitioner attempt to inject federal constitutional considerations into the litigation. Further, even had there been the proper and timely injection of an alleged "federal claim" by Petitioner, we submit that this proceeding harbored no "federal question" whatever in that the decision of the Florida Supreme Court constitutes a proper performance by that Court of its duty and prerogative to define and declare the law of the State of

Florida, including particularly the duty and power to define and declare the scope and dimensions of a cause of action created by the legislature of the State of Florida. We will show further that the decision sought to be reviewed contravenes no overriding federal constitutional requirement. We will argue these matters under separate subheadings below.

I. The Petitioner Did Not Raise Any Federal Question in the State Court Proceedings.

As Petitioner concedes (Petition, page 10), the Petitioner did not raise any federal constitutional question in the State Court proceedings until after the filing of the decision of the Florida Supreme Court. It is clear on the face of both the opinion of the Florida Supreme Court and the intermediate court of appeal that Petitioner considered the question presented to those courts as nothing more than a question of the interpretation of a Florida Statute. In this regard, Petitioner's course of action following the adverse judgment in the trial court is revealing. At that juncture the case was in precisely the same posture it is now. That is to say, the trial judge had ruled that contributory negligence of Petitioner's decedent was a complete bar to recovery under Florida principles and not a partial bar under maritime principles. The Petitioner took an appeal to the Second District Court of Appeal of Florida, an intermediate appellate court. Had such appeal involved a controlling provision of the United States Constitution, as is now asserted by Petitioner, such appeal would have been required to be taken directly to the Supreme Court of Florida. See, Fla. Const., Art. 5, §§ 4(2) and 5(3).

Furthermore, the issue presented to the Second District Court of Appeal by Petitioner (Appellant then), as stated by that Court (Pet. App. 7) was purely an issue involving the interpretation of the express language of a local

statute. (Pet. App. 7, 11). The decision of the intermediate appellate court does not undertake to decide, in any way whatever, any question involving the provisions of the United States Constitution. The same is true of the ensuing decision of the Supreme Court of Florida (Pet. App. 1-3) sought to be reviewed here. The Florida Supreme Court decision addresses itself exclusively to the questions of (1) the interpretation of a Florida Statute, (2) the problem of ascribing to it its intended conceptual effect and meaning, and (3) the task of defining for Florida litigants the scope and contents of rights, remedies, and burdens accorded to persons bringing, or defending, lawsuits predicated solely upon the provisions of the Florida Wrongful Death Act.

In these circumstances we respectfully submit that the Petitioner wholly failed to preserve "federal questions" to serve as a proper basis for review by this Honorable Court.

The Petitioner (Petition, page 2) grounds jurisdiction assertedly on the provisions of 28 U.S.C. 1257(3). This provision authorizes Certiorari review by this Court of decisions of the highest court of a state:

> ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . . ."

But in the exercise of this jurisdiction, this Court has emphasized repeatedly that the alleged federal question must be presented to or decided by the state court. Thus, in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672-673, 84 L.Ed. 849 (1940), this Court said:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to re-

> frain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

With particular regard to the decision of a state court which simply construes a state statute in a manner thereafter alleged to be repugnant to federal law this Court said in *Louisville & N. R. Co.* v. *Louisville*, 166 U.S. 709, 715-716, 17 S.Ct. 725, 41 L.Ed. 1173 (1897):

> "The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. . . . It is now said that as the proper construction of the statute was definitely settled by the court of appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract . . . and because it denied the equal protection of the laws in contravention of the 14th Amendment, although no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient."

Moreover, the attempted raising of a federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless that court actually entertains the petition and expressly decides the question. See, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). And a

waiver of federal question results when the litigant, as did Petitioner herein, fails to follow state appellate procedure providing for direct review of the federal question by the state supreme court but seeks review instead in the intermediate appellate tribunal. See, *Central Union Tel. Co.* v. *Edwardsville,* 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925).

In sum, we respectfully submit that the Petitioner not only failed to bring a federal claim to the attention of the state courts with fair precision, but failed to do so at all. Accordingly, we submit that the present Petition is procedurally ill-founded and should be denied.

II. The Central Question of Law Considered by the Three Florida State Courts Below Was Purely Local and Non-Federal in Character and Cannot Serve As a Basis for Jurisdiction Here.

Under this subheading it is assumed for the purposes of argument only that the purported federal grounds asserted here as a basis for granting the writ were properly preserved below. Even with this assumption we respectfully submit that the proceedings in the state courts were attended by no potential federal questions whatever. Instead, as Petitioner's attitude in the state courts bespeaks, the questions arising from the litigation were, by clear definition derived from decisions of this Court, purely local questions of state law. The litigation began in the Circuit Court for Polk County, Florida, as a statutory suit for civil damages pursuant to the provisions of the Florida Wrongful Death Act, Fla. Stat., § 768.01. The cause of action sought to be enforced was created by the Florida legislature. In the trial court the question arose as to whether the statute contemplated recovery of money by Petitioner in the event the jury determined that Petitioner's decedent negligently contributed to his own death. The trial court and the Florida Supreme Court

construed the legislative intent to be that there should be no recovery under the statute in the event of such negligence on the part of Petitioner's decedent. It is difficult to conceive of a more uniquely local and non-federal legal question. And the two appellate decisions rendered herein (Pet. App. 1-11) show on their face that the result was reached solely upon consideration and determination of an adequate and independent non-federal legal question.

This Court has consistently and emphatically adhered to the self-imposed principle that it will *not* review a state court judgment based upon an adequate and independent non-federal ground. See, *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 429, 444 (1875); *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

Moreover, Petitioner's effort to convert the "non-federal" basis of the state court judgment into a "federal ground" must clearly fail. Until now Petitioner has never claimed assertion of a federal claim. Until now Petitioner has acknowledged that the wrongful death action being pursued was a non-federal cause of action created by the State of Florida and governed in its definition and scope by the laws of the State of Florida as declared by the courts of Florida. And it was entirely meet and proper that the Petitioner so acquiesce in such a "choice-of-law" principle since that is the principle recognized and approved by this Court for application in Wrongful Death Act Suits arising from fatal accidents on navigable water within the territorial waters of a state. The often cited decision of this Court in *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 506, 3 L.Ed.2d 524 (1959), restated and buttressed this choice of law principle which had been

emphatically announced as early as 1886. Thus, in *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), this Court said (119 U.S. 214):

> "[I]f the admiralty adopts the (State Wrongful Death) statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

Of course, we note Petitioner's present contentions (1) that *Tungus* should now be overruled and replaced by the idea that the various state wrongful death acts should be used simply to fill the void in the federal legislative pattern; (2) that the Courts in the judicial administration of these acts (including state courts administering their own acts) should disregard the state-imposed limitations upon which their enactment was conditioned; and (3) that federal maritime principles should be imported into these acts even though they be contrary to the express or judicially ascertained intent of the enacting legislature. We submit that the pronouncements of this Court in *Tungus* and *Harrisburg* regarding choice-of-law were not so ill-conceived as to be dismissed so casually. It is worthy of note that the choice-of-law principle stated by this Court in *Tungus* has, according to our research, been followed no less than 35 times by this Court, federal district and circuit courts. Rather than enumerating these decisions in the body of this brief we have listed these decisions chronologically in the "Glossary" at the end of the brief. Thus, the holding of *Tungus* that the state law governs these suits has become firmly embedded as precedent. We submit that such emphatic precedent cannot be lightly regarded or thoughtlessly abolished. We are not unaware that some courts have chaffed at the *Tungus* rule and have even predicted its

change in the interest of uniformity. However the case under consideration involved amphibious airboats designed to operate on calm, inland waters. We submit the circumstances are maritime but local in nature and we submit that the maritime incidents to the accident herein are miniscule in comparison to the basic and fundamental local character of the occurrence. Moreover, the *Tungus* choice-of-law principle is eminently sound.

The enactment of state wrongful death acts has been attended by a variety of limitations and conditions. In the absence of these limitations and conditions the statutes presumably would never have been enacted at all. And in administering these acts in the courts these limitations and conditions surely must be acknowledged and applied according to the considered views of the state courts charged with the responsibility of shaping the laws of the states and construing their statutes.

Accordingly, the contributory negligence vis-a-vis comparative negligence question was properly presented to the Florida Supreme Court as a question governed by the substantive law of Florida. That is to say, the question was presented as one to be decided by the Florida Court on the basis of that Court's view as to the applicable *state* law. The question decided by the Florida Court was, therefore, purely local and non-federal. The opinion therefore furnishes no basis for jurisdiction here.

III. The Decision Sought to Be Reviewed Contravenes No Federal Constitutional Requirements.

Again, we assume for purposes of argument only that federal constitutional considerations were properly raised below by Petitioner. Even so assuming we submit that the decision of the Florida Supreme Court contravenes no federal constitutional requirements. We note that Petitioner cites no decision supporting the contention that any provi-

sion of the United States Constitution has been violated. Petitioner simply "cites" from the United States Constitution: Article III, Section 2 (the judicial article extending jurisdiction to United States Courts to "cases of admiralty and maritime jurisdiction"); Amendment XIV, Section 1 (the "equal protection" clause); and Article VI (the supremacy clause).

We respectfully submit that reliance upon these provisions in this case is wholly misplaced.

For example, this was plainly not a "case of admiralty jurisdiction" since the suit was founded exclusively on the provisions of a state statute, arose in circumstances wherein the federal maritime law furnishes no right or remedy whatever, and is one in which plaintiff did not even attempt to use the admiralty jurisdiction, electing rather to proceed, by jury trial, in state court.

Secondly, Petitioner's reliance upon the "equal protection" clause suggests that the Florida Wrongful Death Act, as construed, accords to Petitioner protection less generous than the maritime law. But the Florida Wrongful Death Act afforded Petitioner protection infinitely more generous since the federal maritime law affords none at all.

This brings us to the final observation regarding the "supremacy clause." Here there are simply no "laws of the United States" which might be said to override the state laws applied here. As *Tungus* points out (79 S.Ct. at 507) the United States Congress has studiously sought to preserve state sovereignty over death actions arising within the territorial waters of the states. Here Petitioner simply sought the benefits of an enactment of the Florida legislature. Petitioner received precisely the same treatment as would any other claimant under that Act. We submit that Petitioner cannot predicate a valid constitutional ob-

jection upon the fact that the Florida courts refused to extend to Petitioner rights larger than those afforded the vast majority of claimants under the Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition of Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to William Wagner, Esquire, Wagner, Cunningham and Vaughan, 412 Pierce Street, Tampa, Florida, Peter G. Kalogridis and Podhurst & Orseck, 2nd Floor, Concord Building, Miami, Florida, Attorneys for Petitioner, this 11th day of April, 1969, and to the Clerk of the Supreme Court of Florida.

By: William A. Gillen

GLOSSARY

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Union Carbide Corp. v. *Goett*, 278 F.2d 319, 320 (4th Cir. 1960), cert. denied 364 U.S. 826, 81 S.Ct. 64 (1960).

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